Orr v. Orr: A Husband's Constitutional Right Not to Pay Alimony

The United States Supreme Court in *Orr v. Orr*[1] held that Alabama statutes imposing alimony obligations on husbands but not wives violated the equal protection clause of the fourteenth amendment. In reaching its decision, the Court subjected the Alabama statutes to a stricter standard of equal protection analysis than the Court had applied to previously challenged gender-based classifications that favored women over men. Furthermore, the Court made it clear that this stricter standard of scrutiny would have applied whether or not the statutory purpose of the classification had been affirmatively designed to alleviate the effects of past discrimination practiced upon women.

The Court in *Orr* granted standing to a man who did not seek alimony for himself but instead sought to avoid payment of alimony imposed under a prior divorce settlement. Therefore, even if the Court held that Alabama's alimony statutes violated the Equal Protection Clause, it could not guarantee Mr. Orr relief from his alimony burden. If the Alabama State Courts responded to a ruling of unconstitutionality by neutrally extending alimony benefits to men, Mr. Orr would remain obligated to pay alimony. Only on the unlikely state response of total abolition of alimony would Mr. Orr escape his burden.

This Comment will examine the Court's opinion in *Orr* and will demonstrate that the Court's grant of standing to a party who arguably did not meet the constitutional requirements of standing followed a recent liberal trend[2] in this area of law. The Court in *Orr*, however, declined the opportunity to fashion a rational framework for the law of standing, so that it remains a highly amorphous area of law. This Comment will also explain that the Court's decision on the equal protection issue followed recent precedent[3] in the area of reverse racial discrimination and developed a consistent standard of equal protection analysis applicable to statutes that discriminate in favor of females as well as statutes that discriminate against females. Finally, the equal protection decision in *Orr* will be criticized for its failure to provide guidelines that a bona fide affirmative action gender-based statute may follow to pass constitutional muster.

I. Facts and Holding

A. *Facts*

On February 26, 1974, a final decree of divorce was entered dissolving

1. 440 U.S. 268 (1979).

2. *See, e.g.*, Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

3. 438 U.S. 265 (1978).

the marriage of William Orr, the appellant, and Lilliam Orr, the appellee.[4] Incorporated within this decree was a written stipulation by which Mr. Orr agreed to pay Mrs. Orr the sum of $1,240 per month for her support and maintenance.[5] On July 28, 1976, alleging that Mr. Orr was $2,848 in arrears in his alimony payments,[6] Mrs. Orr initiated a contempt proceeding in the Circuit Court of Lee County, Alabama.[7] On August 19, 1976, at the hearing on Mrs. Orr's petition, Mr. Orr filed a motion in his defense alleging that Mrs. Orr's petition was founded on an illegal decree since it relied upon Alabama alimony statutes[8] that were unconstitutional because they authorized the courts to place an obligation of alimony upon husbands but not upon wives.[9] The Circuit Court denied Mr. Orr's motion and awarded Mrs. Orr $5,524, covering back alimony and attorney's fees.[10]

Mr. Orr appealed the judgment, relying on his federal equal protection claim.[11] The sole issue taken before the Court of Civil Appeals of Alabama was whether Alabama's alimony statutes were constitutional.[12] Adopting the rationale of *Kahn v. Shevin*,[13] the court sustained the statutes' constitutionality, noting that the disparity in earning between a lone woman and a lone man that had justified preferential treatment for widows in *Kahn* was equally applicable to divorcees.[14]

On May 24, 1977, the Supreme Court of Alabama granted Mr. Orr's petition for a writ of certiorari, but on November 10, 1977, the court quashed the writ as improvidently granted.[15] Although the majority filed no opinion, a concurring opinion by Justice Almon noted that gender-based laws "designed to foster and preserve the family unit"[16] were constitutionally permissible. Justice Jones, however, in his dissent, found the challenged statutes arbitrary and without rational basis.[17]

The United States Supreme Court noted probable jurisdiction to hear Mr. Orr's appeal.[18] In a 6-3 decision[19] it reversed the Alabama Court of

4. 440 U.S. 268, 270 (1979).

5. Orr v. Orr, 351 So.2d 906, 906 (Ala.1977) (Torbert, J., dissenting), *rev'd*, 440 U.S. 268 (1979).

6. *Id.* at 907.

7. 440 U.S. 268, 270 (1979).

8. ALA. CODE §§ 30-2-51, 30-2-52 (1975).

9. 440 U.S. 268, 271 (1979).

10. *Id.*

11. *Id.*

12. 351 So. 2d 904, 904 (Ala. Civ. App. 1976), *cert. denied*, 351 So. 2d 906 (Ala. 1977), *rev'd* 440 U.S. 268 (1979).

13. 416 U.S. 351 (1974).

14. 351 So. 2d 904, 905 (Ala. Civ. App. 1976), *cert. denied*, 351 So. 2d 906 (Ala. 1977), *rev'd*, 440 U.S. 268 (1979), *quoting*, Kahn v. Shevin, 416 U.S. 351 (1974).

15. 351 So. 2d 906 (Ala. 1977), *rev'd*, 440 U.S. 268 (1979).

16. *Id.* (Almon, J., concurring).

17. *Id.* at 908 (Jones, J., dissenting).

18. 436 U.S. 924 (1978).

19. Chief Justice Burger and Justices Powell and Rehnquist dissented on jurisdictional grounds.

Civil Appeals.[20] The majority found Mr. Orr to have standing to assert his equal protection defense[21] and dismissed adequate state grounds considerations,[22] noting that the Alabama Court's had deemed the federal constitutional issue the "sole issue" before them.[23] Addressing the merits of the case, the Court held the Alabama statutory scheme that permitted awards of alimony to women but not to men deprived Mr. Orr of the constitutionally guaranteed right to equal protection under the laws.[24]

II. STANDING

A. *Constitutional Background*

Mr. Orr's standing before a federal court to assert his constitutional defense depended upon whether his challenge to the Alabama statutory scheme fell within the constitutional and prudential limitations on federal court jurisdiction.[25]

The constitutional limitations of the standing doctrine require the litigant to have made out a case or controversy[26] within the meaning of article III.[27] The threshhold question in determining the standing aspect of justiciability is whether the litigant "has alleged such a personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation of issues."[28]

In addition to this minimum constitutional requirement, the Supreme Court has developed prudential rules of self-restraint that have ordinarily precluded parties from challenging the constitutionality of state or federal actions by invoking the rights of third persons.[29] The common theme

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20. 440 U.S. 268, 271 (1979).

21. *Id.* at 272.

22. The adequate state grounds considered were timeliness in asserting the constitutional claim and state contract law. *Id.* at 276-77.

23. 351 So. 2d 904, 905 (1979).

24. 440 U.S. 268, 283 (1979).

25. Warth v. Seldin, 422 U.S. 490, 498 (1974).

26. In Muscrat v. United States, 219 U.S. 346, 356-59 (1911), the Court explained:

> [B]y the express terms of the Constitution, the exercise of judicial power is limited to "cases" and "controversies". . . . [Art. III] does not extend the judicial power to every violation of the Constitution which may possibly take place, but to a "case in law or equity" in which a right under such law is asserted in a court of justice.

"Case or controversy" is not defined by the Constitution, and the Supreme Court has not developed a mechanical defination with specific terms, but instead has established a number of criteria that must be met before a case or controversy is present. *See, e.g.*, Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-48 (Brandeis, J., concurring) (1935).

27. U.S. CONST. art. III, § 2, cl. 1.

28. Baker v. Carr, 369 U.S. 186, 204 (1962).

29. The limitation of judicial self-restraint has been riddled with exceptions under the doctrine of jus tertii—the litigant's claim that a single application of the law injures him and impinges upon the constitutional rights of third parties. The factors for allowing jus tertii include: (1) the presence of some substantial relationship between the litigant and the third party; (2) the impossibility of the rightholder asserting his own constitutional rights; and (3) the need to avoid dilution of the third party's constitutional rights. Note, *Standing To Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974).

underlying both the constitutional and the prudential limitations has been that a litigant could not attack the constitutionality of a statute unless he has shown that he himself has been injured by its operation.[30]

It has been argued that in recent years the constitutional limitations of standing have been substantially reduced. The Supreme Court "without recognizing the significance of what it has done . . . transformed the law of standing from a constitutional to a statutory question."[31] The foundation for this transformation first appeared in Justice Harlan's dissent in *Flast v. Cohen*,[32] in which he challenged the constitutional mandate that a litigant have a personal stake in the outcome of the controversy. He depicted individual litigants to be acting as "private attorney's-general"[33] and would have granted these litigants standing as representatives of the public interest to contest the constitutionality of governmental actions. The relief that the courts could afford these litigants consisted entirely of the vindication of rights held in common by all citizens.[34] Although a majority of the Court has not expressly adopted Justice Harlan's view, the Court has allowed Congress by statute[35] to confer standing on parties who arguably would not otherwise meet the article III case or controversy requirement of personal stake in the outcome. For example, the Clean Air Act[36] provides that "any person may commence a civil action on his own behalf . . . against the Administrator [of the Environmental Protection Agency] where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator."[37] The Act's legislative history disclosed that this provision was drawn to permit plaintiffs to challenge administrative inaction without having to demonstrate any injury in fact.[38] Therefore, arguably the only *constitutional* requirement of standing that remains would be the concrete adverseness that enables the litigant to present the issues of the controversy adequately.

The Court has referred to the law of standing as a "complicated specialty of federal jurisdiction."[39] Recent alterations in the law of standing, which have not been consistently applied, have added to its

30. Barrows v. Jackson, 346 U.S. 249 (1953).

31. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 665 (1977).

32. 392 U.S. 83 (1968). *See* note 44 and accompanying text *infra*.

33. *Id.* at 119.

34. *Id.* at 118.

35. *See, e.g.*, Administrative Procedure Act § 10, 5 U.S.C. § 702 (1977), under which United States v. SCRAP, 412 U.S. 669 (1973), was brought. *SCRAP* is discussed at note 50 and accompanying text *infra*; Civil Rights Act of 1968, 42 U.S.C. § 3610(a) (1973), under which Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), was brought. *Trafficante* is discussed at note 48 and accompanying text *infra*.

36. 42 U.S.C. §§ 1857-18571 (1970 & Supp. V 1975).

37. *Id.* 1857h-2(a) (2) (1970).

38. *See* Friends of the Earth v. Carey, 535 F.2d 165 (2d Cir. 1976).

39. United States *ex rel* Chapman v. Federal Power Comm'n, 345 U.S. 153, 156 (1953).

complexity.[40] These recent changes, whether they alter the constitutional or prudential limitations on standing, can best be explained by dividing the standing requirements they alter into three categories: direct injury, redressable injury, and injury in fact.

1. *Direct Injury Requirement*

The basic requirement of direct injury, or causal relationship, was set forth in the companion cases of *Frothingham v. Mellon* and *Massachusetts v. Mellon*,[41] which held that a litigant who had challenged a governmental action was required to show "that he [had] sustained or [was] immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he [suffered] in some indefinite way in common with people generally."[42] Based on this criterion, the Court in *Frothingham* held a federal taxpayer to have no standing to challenge a federal expenditure. Thirty years later in *Doremus v. Board of Education*,[43] the Court continued to deny taxpayers' suits under the direct injury requirement as defined in *Frothingham*. *Doremus* involved a taxpayer's challenge of Bible-reading in public schools. The Court found the taxpayer to lack the requisite special injury necessary to invoke federal court jurisdiction.

In the late Sixties, the Court embarked on a liberalizing trend of the direct injury requirement. In *Flast v. Cohen*[44] the Court permitted a taxpayers' suit that sought to enjoin federal expenditures to finance instruction in parochial schools. The Court, under a "nexus test,"[45] found a taxpayer to be a "proper party to allege the unconstitutionality of exercises of congressional power under the taxing and spending clause of Art. I. § 8, of the Constitution."[46]

In the years following *Flast*, the Court granted standing to litigants alleging an increasingly "attenuated line of causation to the eventual injury."[47] In *Trafficante v. Metropolitan Life Insurance Company*,[48] the Court held that tenants of an apartment complex had standing to complain that the owner racially discriminated against minorities by renting in violation of the Civil Rights Act of 1968.[49] The alleged direct injury in *Trafficante* embodied the lost social and economic benefits of

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40. *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22 (1978 Supp.).

41. 262 U.S. 447 (1923).

42. *Id.* at 488.

43. 342 U.S. 429 (1952).

44. 392 U.S. 83 (1968).

45. The "nexus test" required some logical link between the taxpayer's status as a taxpayer and his claim of injury. *Id.* at 102.

46. *Id.*

47. United States v. SCRAP, 412 U.S. 669, 688 (1973).

48. 409 U.S. 205 (1972).

49. The Civil Rights Act of 1968, 42 U.S.C. § 3610(a) (1973), gave the right to sue to any person who claimed to have been injured by a discriminatory housing practice.

living in an integrated community. In 1973, in *United States v. SCRAP*,[50] the Court ruled environmental groups to have standing to challenge the Interstate Commerce Commission's failure to suspend a surcharge on railroad freight rates. A general rate increase would allegedly have caused increased use of nonrecyclable commodities, thus resulting in the need to use more natural resources, some of which might be taken from the environmental groups' Washington area, and resulting also in more refuse that might be discarded in national parks in the same area.

Although the Court in *SCRAP* reached a peak in its liberal trend holding an "identifiable trifle enough for standing,"[51] the progression of this trend had not been consistent. Just a year prior to its decision in *SCRAP*, the Court decided *Linda R. S. v. Richard D.*[52] in which the direct injury requirement was defined by a much stricter standard. In *Linda R. S.*, the Court found the mother of an illegitimate child to have no standing to challenge a state penal statute that had been judicially interpreted to provide prosecution for nonsupport only of parents of legitimate children. Citing *Massachusetts v. Mellon*,[53] the Court categorized the appellant's complaint as an abstract injury, insufficient under the standing doctrine that required "some *direct* injury *as the result* of [a statute's] enforcement."[54]

In *Schlesinger v. Reservists Committee to Stop the War*,[55] also counter to the trend set in *Trafficante* and *SCRAP*, the Court denied standing to citizens who sought to enjoin members of Congress from serving in the Armed Forces Reserve. Federal court jurisdiction required more than the assertion of a generalized interest under the incompatibility clause of article I, section six, of the Constitution.[56] In addition, in *United States v. Richardson*,[57] the *Flast* decision was strictly limited to taxpayer suits under article I, section eight of the Constitution. The Court held that a federal taxpayer did not have standing to challenge that the Central Intelligence Agency Act, which provided that C.I.A. appropriations and expenditures not be made public, violated article I, section nine, of the Constitution, which requires that a regular statement of account of the receipts and expenditures of all public money be published from time to time.

Continuing to backslide to rigid enforcement of the causal relationship requirement, the Court in *Warth v. Seldin*[58] denied standing to a challenge of exclusionary zoning practices brought by plaintiffs who

50. 412 U.S. 669 (1973).
51. *Id.* at 689, n.14.
52. 410 U.S. 614 (1972).
53. 262 U.S. 447 (1923). *See* notes 42-43 and accompanying text *supra*.
54. 410 U.S. 447, 618 (1973).
55. 418 U.S. 208 (1974).
56. *Id.* at 217.
57. 418 U.S. 166 (1974).
58. 422 U.S. 490 (1975).

represented local taxpayers', building associations' and minority interests. The Court maintained that the plaintiffs did not meet the minimal article III requirement that the asserted injury be the consequence of the defendant's actions. In 1976, the Court reiterated this position in *Simon v. Eastern Kentucky Welfare Rights Organization*.[59] There the Court held that indigents, who had been denied hospital services, had no standing to challenge a Revenue Ruling that granted favorable tax treatment to hospitals despite their refusal to give full service to indigents.

In the same year in two separate decisions, the Court granted standing to claimants alleging seemingly no greater causal relationship than the plaintiffs in either *Warth* or *Eastern Kentucky Welfare Rights*. On facts almost identical to those in *Warth*, the Court, in *Arlington Heights v. Metropolitan Housing Corporation*,[60] granted standing to a housing association to challenge exclusionary zoning practices. Furthermore, in 1976 the Court in *Planned Parenthood of Central Missouri v. Danforth*[61] found two physicians to have standing to challenge abortion statutes that required women under eighteen to obtain parental consent and married women to obtain spousal consent. The causal relationship requirement was not emphasized in either *Arlington Heights* or *Planned Parenthood*. Moreover, in a more recent case, *Duke Power Company v. Carolina Environmental Study Group*,[62] language of the opinion limited the causal relationship requirement to taxpayers' suits. "We . . . cannot accept the contention that, outside the context of taxpayers' suits, a litigant must demonstrate anything more than injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury to satisfy the 'case or controversy' requirement of Art. III."[63]

2. *Redressable Injury Requirement*

In *Warth* the Court added a second element to the standing standard. In addition to the requirement of a direct injury resulting from the challenged practices, the Court required the claimant to allege "that he personally would benefit in a tangible way from the court's intervention."[64] *Eastern Kentucky Welfare Rights* further defined the redressable injury requirement of *Warth* as a "substantial likelihood that victory in this suit would result in respondents' receiving the . . . treatment they desire."[65]

In subsequent cases the redressable injury requirement did not pose an impenetrable barrier to standing. If the Court wished to reach the merits of a case, it encountered little problem in finding a substantial likelihood

59. 426 U.S. 26 (1976).
60. 429 U.S. 252 (1977).
61. 428 U.S. 52 (1976).
62. 438 U.S. 59 (1978).
63. *Id.* at 79.
64. 422 U.S. 490, 508 (1975).
65. 426 U.S. 26, 45-6 (1976).

that the injury was redressable. The Court in *Arlington Heights* found at least a "substantial probability"[66] that the claimant there would gain ultimate redress through the Court's intervention. Similarly, in *Duke Power* the Court accepted the district court's finding of a substantial likelihood that the nuclear power plants in issue would be neither completed nor operated absent the validity of the challenged Price-Anderson Act.[67]

Since its decision in *Eastern Kentucky Welfare Rights* the Court has not relied upon the redressable injury requirement to deny a litigant standing. Furthermore, in *Regents of the University of California v. Bakke*,[68] language in a footnote of Justice Powell's opinion reduced the "substantial likelihood" requirement to merely any likelihood.[69] Justice Powell observed that

> "even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of *any* injury to himself that is likely to be redressed by favorable decision of his claim."[70]

3. *Injury in Fact Requirement*

The redressable injury requirement fulfilled to a large extent the same purpose as the direct injury requirement. If the Court's invalidation of the challenged government action would redress the litigant's injury, a good likelihood existed that the alleged injury was caused by the challenged action. Therefore, although the direct injury requirement was strictly limited to taxpayers' suits by the language of *Duke Power*, its underlying function continued to be served by the redressable injury requirement. Recent Supreme Court decisions have not, however, required strict enforcement of the redressable injury requirement.[71]

The problem with both the direct injury requirement and the redressable injury requirement is that neither has been clearly defined. The courts have been allowed great leeway in determining how much of a connection between the alleged injury and challenged action is needed and how much of a likelihood that the injury be redressable is required. This has resulted in inconsistent application of the law of standing. One solution to this problem is to eliminate both of these requirements and to make injury in fact the only requirement for standing.

Injury in fact as the sole test of standing was first espoused in 1970 by Justices Brennan and White in *Association of Data Processing Service*

66. 429 U.S. 252, 264 (1976).
67. 438 U.S. 59, 77 (1978).
68. 438 U.S. 265 (1978).
69. *Id.* at 280-81, n.14.
70. *Id.* [emphasis added]
71. *See* notes 66-70 and accompanying text *supra*.

Organization, Incorporated v. Camp.[72] The majority in *Camp* presented a two part test to determine whether standing requirements had been met: (1) "whether the plaintiff allege[d] to have suffered some injury in fact,"[73] and (2) "whether the interest sought to be protected by the complainant [was] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[74] In a concurring opinion, Justices Brennan and White argued that injury in fact should be the sole test for standing.[75] Because of its failure to mention the zone of interests test, the Court in *SCRAP* and *Trafficante* appeared to adopt the Brennan-White position. This approach was temporarily abandoned, however, as the Court in *Warth* and *Eastern Kentucky Welfare Rights* returned to strict application of the direct injury requirement and replaced the zone of interest test with the redressable injury requirement. In *Duke Power*, however, injury in fact replaced the direct injury requirement in nontaxpayer suits,[76] and in Justice Powell's opinion in *Bakke* the importance of the redressable injury requirement was greatly reduced.[77] Therefore, prior to the Court's decision in *Orr v. Orr*, injury in fact was the primary requirement of standing in federal courts.

B. Orr v. Orr

The Court in *Orr v. Orr*[78] addressed the jurisdictional issue whether Mr. Orr, who did not seek alimony for himself, could attack on equal protection grounds state statutes[79] that awarded alimony to women but denied alimony to men. The Court did not question whether Mr. Orr had alleged an injury in fact. The Court did inquire, however, into whether that injury would be redressed by a favorable holding in federal court.

In his dissent, Justice Rehnquist, who was joined by Chief Justice Burger, argued that Mr. Orr's alleged injury (the burden of alimony payments) was neither a result of, nor directly related to, the challenged statutes. Justice Rehnquist contended that the alimony obligation was not conferred by statute but instead was fixed by agreement between Mr. Orr and his ex-wife. Mr. Orr made no claim this agreement would be unenforceable under state law even if the Alabama alimony statutes were declared unconstitutional. Justice Rehnquist therefore found Mr. Orr not to have met " 'the minimum requirement of Art. III: to establish that, in

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72. 397 U.S. 150 (1970).

73. *Id.* at 152.

74. *Id.* at 153. The zone of interest test was largely unadopted in subsequent decisions. *See, e.g.*, K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22 (1970).

75. 397 U.S. 150, 172, (1970).

76. *See* notes 62-63 and accompanying text *supra*.

77. *See* notes 68-69 and accompanying text *supra*.

78. 440 U.S. 268 (1979).

79. *See* note 8 *supra*.

fact the asserted injury was the consequence of the [unconstitutional statutes]. . . . ' "[80] The majority did not address the dissent's argument, presumably because it espoused a direct injury requirement that *Duke Power* had held relevant only to taxpayers' suits.

The majority found Mr. Orr to have standing under primarily an injury in fact-redressable injury standard. This position, however, was supported by four alternative bases: (1) Mr. Orr had made a claim for alimony; (2) Mr. Orr would receive ultimate relief in the event Alabama would repeal its alimony statutes; (3) Mr. Orr would receive partial relief in the event Alabama would neutrally extend alimony benefits to husbands; and (4) Mr. Orr's alimony burden alone conveyed him standing.

1. *Mr. Orr's Claim To Alimony*

In a footnote,[81] the majority alluded to the possibility that Mr. Orr's circuit court motion challenging the constitutionality of the Alabama statutes could be construed as a claim for alimony. If the Court accepted Mr. Orr's motion as a claim for alimony, then it would have satisfied the redressable injury theory of standing, which requires a substantial likelihood that the requested relief ultimately redress the alleged harm. If the statutes were found unconstitutional, there would exist a substantial likelihood that Alabama would respond by extending benefits to husbands rather than abolishing alimony altogether. Therefore, because a sex-neutral alimony statute would provide a husband seeking alimony with ultimate relief, Mr. Orr would have met the redressable injury requirement of standing. Justice Rehnquist, however, in dissent, pointed out a serious flaw in this reasoning.[82] On the basis of financial need, Mr. Orr was demonstrably not entitled to alimony even if he had sought it.

The majority further noted that the Alabama appeals court opinion referred to one of Mr. Orr's arguments as challenging the failure of the statutes to provide alimony to husbands.[83] Although the Court recognized that Mr. Orr's argument might have been an improper way to assert standing under *state* law, it noted that the state court did not challenge Mr. Orr's standing. Justice Rehnquist argued that this reasoning failed to acknowledge that a state court's opinion could not convey standing to a litigant in a federal court.[84] At a minimum, federal standing must be ruled by the case or controversy provision of article III, section two, of the Constitution.[85]

2. *Ultimate Relief by Repeal of the Statutes*

Assuming that Mr. Orr had not made a proper assertion for alimony,

80. 440 U.S. 268, 296 (1979), *quoting*, Warth v. Seldin, 422 U.s. 501, 505 (1975).

81. *Id.* at 271, n.2.

82. *Id.* at 294.

83. *Id.*

84. *Id.* at 294, n.2 (Rehnquist, J., dissenting).

85. *Id.*

the majority found the possibility of repeal of the alimony statutes to be a second route around the standing requirements. Justice Brennan reasoned that in every equal protection attack on an underinclusive statute, the state could choose to either extend the benefits to the previously excluded class or deny the benefits to all classes by repealing the statute. The Court had no way of knowing in which way the state would respond. Regardless of the position he took, Mr. Orr's success theoretically could be defeated. If Mr. Orr asserted a claim to receive alimony, he would be deprived this relief if Alabama chose to repeal the alimony statutes. If he asserted a right not to pay alimony, he would be deprived this relief if Alabama chose to extend alimony benefits to husbands. The Court therefore stated that "unless we are to hold that underinclusive statutes can never be challenged because any plaintiff's success can theoretically be thwarted, Mr. Orr must be held to have standing here."[86]

Justice Brennan supported the preceding conclusion with the Court's holding in *Stanton v. Stanton*[87] and *Craig v. Boren*,[88] in which the Court had granted standing to litigants despite its recognition that the state's response to the finding of unconstitutionality could deny the litigants ultimate relief. Both *Stanton* and *Craig* involved gender-based classifications that designated the age of majority at eighteen for females and at twenty-one for males. In *Stanton*, the plaintiff would have been awarded ultimate relief if the state chose to raise the age of female majority to twenty-one for child support purposes. In *Craig* the plaintiff would have received her requested relief if Oklahoma chose to lower the age of majority for males to eighteen. In both *Stanton* and *Craig* a substantial likelihood existed that the state would decide to remedy the invalid statute in a way that provided ultimate relief to the party successfully asserting the constitutional challenge.[89]

In *Orr* there was no substantial likelihood that Alabama would choose to repeal its alimony statutes. As Justice Rehnquist observed, "the possibility that Alabama will turn its back on the thousands of women currently dependent on alimony checks for their support is, as a practical matter, non-existent."[90] Even if such an impractical course were taken by Alabama, Mr. Orr had not shown that complete abrogation of the alimony statutes would provide him relief. His alimony obligation was fixed by an agreement between him and his ex-wife. He made no claim that this agreement would be unenforceable under state law in the event of repeal of the alimony statutes.

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86. *Id.* at 272.

87. 421 U.S. 7 (1975).

88. 429 U.S. 190 (1976).

89. In *Stanton*, other Utah Code provisions defined child to be a son or *daughter* under twenty-one years of age. 421 U.S. at 12. In *Craig* the Oklahoma civil and criminal responsibility statutes placed the age of majority for both sexes at eighteen. 429 U.S. 190, 197 (1976).

90. 440 U.S. 268 (1979).

Although it did not specifically address the preceding arguments, the majority stated that Mr. Orr had standing because his "constitutional attack holds the only promise of escape"[91] from his burden. It was clear that the chances of Mr. Orr's ultimate success failed to reach the substantial likelihood requirement espoused in *Eastern Kentucky Welfare Rights*, because it was doubtful that *any* likelihood existed that Alabama would choose to completely abrogate its alimony statutes. Therefore, the Court took a further liberal step beyond the "any likelihood" requirement[92] set forth in *Bakke*. The majority in *Orr* reduced the redressable injury requirement from a likelihood to an "only promise" of escape from the injury.

3. *Partial Relief by Gender-Neutral Alimony*

The Court, again by footnote,[93] suggested a third basis supporting their finding of standing. The Court took note of Mr. Orr's argument that even a gender-neutral statute would have afforded him relief in the form of lower alimony payments because the current statutes awarded alimony to wives based not only upon financial need but also upon gender-related factors. Although the Court found it unnecessary to resolve these allegations, it nonetheless noted that they "render unassailable"[94] Mr. Orr's standing to challenge the constitutionality of the statutes.

Under this alternative of standing the Court inferred that although there must be some chance that the injury be redressable, the ultimate relief of that injury need not be complete. The chance of any relief—albeit only partial—would have met the redressable injury requirement.

4. *Injury in Fact as the Sole Test of Standing*

The final basis of standing did not deal with the probability of Mr. Orr's ultimate success. It emphasized instead the burden borne by Mr. Orr that he would not have borne had be been female. The Court found that this "burden alone is sufficient to establish standing."[95] The Court reinforced this position with dicta taken from a footnote in *Linda R. S. v. Richard D.*,[96] in which it maintained that "the parent of a legitimate child who must by statute on the ground that the parents of an illegitimate child is not equally burdened."[97] Similarly, the statutes challenged by Mr. Orr were underinclusive not only because they failed to grant alimony benefits to financially needy husbands but also because they failed to extend the burden of alimony to financially secure wives with dependent husbands.

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91. *Id.* at 273 (emphasis added).
92. *See* notes 68-69 and accompanying text *supra*.
93. 440 U.S. 268, 273-74, n. 3 (1979).
94. *Id.*
95. *Id.* at 273.
96. 410 U.S. 614 (1973).
97. *Id.* at 619 n.5.

The court waived the standing requirement of redressable injury in Mr. Orr's challenge to the alimony statutes, which were underinclusive in their burden.[98] To establish standing Mr. Orr needed only to prove that he suffered an injury—his obligation to pay alimony. Thus, in challenges to underinclusive statutes, the majority adopted the Brennan-White position of injury in fact as the sole test of standing.

The Court's reasoning under this fourth and final basis of standing was understandable. Applying the injury in fact test to determine Mr. Orr had standing followed a natural progression of the Court's recent liberal trend in the law of standing. Furthermore, under this test the Court escaped the problem of speculating how the state courts would respond to an unconstitutional statute. If injury in fact were the sole test of standing, it would remove from the federal courts the problem of measuring a litigant's chances for ultimate relief. Under this test, the only standing issue the court need address would be whether the litigant had alleged a bona fide injury. If he had, then the standing requirements have been met.

C. *Future Implications of* Orr v. Orr

In expressing the opinion of the majority in *Orr*, Justice Brennan took a further step toward implementing injury in fact as the sole test of standing. The requirement that the injury be redressable by the Court vanished as the Court stated: "The burden alone is sufficient to establish standing."[99] This position was undercut by the tortured reasoning the Court employed to find that Mr. Orr did indeed allege a redressable injury. The Court, nevertheless, espoused a more liberal view on standing by moderating the prior requirement of a likelihood that the injury be redressable to a more easily met requirement that the Court's intervention hold the litigants only promise of relief.[100] This more liberal approach on standing may carry an administrative cost of a substantial increase in the Supreme Court's workload.

In future federal court cases *Orr* generally should be viewed as a further step in the liberal trend in the law of standing. If a claimant has alleged an injury in fact which carries any chance of being redressed by the court's intervention, the claimant should be granted standing.

Although this "liberal" test of standing can be viewed as progressive, forcible criticism can be made against any standing test that requires more than a showing of concrete adverseness.[101] The validity of a redressable injury requirement can be seriously questioned in light of the Court's decision in *Aetna Life Insurance Company v. Haworth*.[102] In *Haworth* the

98. 440 U.S. 268, 272 (1979).

99. *Id.*

100. *See* note 91 and accompanying text *supra*.

101. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 665 (1977).

102. 300 U.S. 227 (1937).

Court upheld the constitutionality of the Declaratory Judgment Act,[103] finding the article III case or controversy requirement met if the Court must decide the claims of truly adversary parties in a fully developed factual setting. The requirement of injury in fact should not be viewed as a constitutional limitation on standing but as a statutory limitation that rests on congressional intention to grant standing to those persons best able to enforce the statute. As Justice Stewart noted in his dissent in *Richardson*,[104] a litigant complaining of a governmental failure to perform a *constitutional* duty has alleged an infringement of a private right to benefit from the performance of that duty.[105] In *Orr*, Mr. Orr's standing to assert his equal protection defense is not conferred by article III of the Constitution but by the equal protection clause of the fourteenth amendment. Mr. Orr's standing to assert this defense should only be questioned if he has failed to demonstrate concrete adverseness of his claim. If the factual setting of Mr. Orr's claim provided adequate illumination of the operation of the challenged alimony statutes, the Court thus should proceed to the merits of his claim without further inquiry into the standing question.

III. EQUAL PROTECTION ISSUES

A. *Constitutional Background*

The Supreme Court traditionally has conducted equal protection analysis under either the rational basis or the strict scrutiny test. If challenged governmental action involved neither fundamental civil[106] or constitutional[107] rights nor suspect classifications based on race,[108] alienage,[109] or national origin,[110] the rational basis test was applied. Under this test a federal court would not set aside a discriminatory classification if any state of facts reasonably could be conceived to justify it.[111] Furthermore, unless the classification was patently arbitrary, the Court would "[presume the legislatures] to have acted within their constitutional power despite the fact that in practice, their laws result in some inequality."[112] When fundamental rights or suspect classifications were involved, however, the Court conducted its equal protection analysis by strict scrutiny. Under this level of analysis, the Court required the

103. 28 U.S.C. § 2201-2202 (1970).

104. *See* note 57 and accompanying text *supra*.

105. 418 U.S. 166, 203 (1974) (Stewart, J., dissenting).

106. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (freedom to marry constitutes as basic civil right).

107. *See, e.g.*, Shaprio v. Thompson, 394 U.S. 618 (1969) (constitutional right to travel interstate).

108. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).

109. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971).

110. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475 (1954).

111. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970).

112. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 425 (1961).

government to demonstrate that the challenged action or legislation served overriding or compelling interests that could not be as well served by either a more carefully tailored classification or less drastic means.[113] Under the strict scrutiny test, the Court employs a virtually irrebuttable presumption against the validity of the challenged action or legislation.[114]

During the past decade the Court developed an intermediate test to be applied in challenges of gender-based classifications. The Court first expressed this test in 1971 in *Reed v. Reed*.[115] In *Reed*, Chief Justice Burger, writing for a unanimous Court, held unconstitutional an Idaho statute that granted a mandatory preference to males when competing applications for letters of probate administration had been filed by male and female family members.[116] Although the Court found the challenged statute's objective of reducing the workload on probate courts "not without some legitimacy,"[117] it found the manner in which that objective was advanced inconsistent with the command of the equal protection clause that "a classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "[118]

Two years later, in *Frontiero v. Richardson*,[119] Justice Brennan, writing for a plurality, went beyond the Court's position in *Reed* to find sex an inherently suspect classification. Based on this finding, the plurality applied "close judicial scrutiny"[120] to a federal statute that, under the guise of administrative convenience, required female Air Force officers, but not male officers, to prove that their spouses were in fact dependent on them for support before increased medical benefits would be made available to them.[121] The Court found the legislation to be premised on the outdated and unsupported presumption of a wife's dependency for support on her husband.[122] The Court therefore found the legislative objective of administrative convenience to fall below the mandate of the equal protection clause. Justice Brennan, however, distinguished this type of legislation from benign gender-based legislation designed to rectify the effects of past discrimination against women. This desired result was achieved because instead of discrimination against women, the legislation gave preferred treatment to women over similarly situated men.[123] The

113. 438 U.S. 265, 299 (1978).
114. 91 HARV. L. REV. 188 (1977).
115. 404 U.S. 71 (1971).
116. *Id.* at 72.
117. *Id.* at 76.
118. *Id.*, *quoting*, Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).
119. 411 U.S. 677 (1973).
120. *Id.* at 682.
121. *Id.* at 678.
122. *Id.* at 681.
123. *Id.* at 689, n.22.

Court in *Frontiero* thus left open the question of the constitutionality of gender-based classifications designed to favor women.

The following year this issue was encountered in *Kahn v. Shevin*.[124] Mr. Kahn, a widower, challenged an 1885 Florida statute that provided a $500 real property tax exemption to widows but not widowers. Expressing the views of the majority, Justice Douglas retreated from his position in *Frontiero* that sex was a suspect classification; accordingly, strict scrutiny of the Florida statute was not required. The Court held this statute constitutional as "a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which the loss imposes a disporportionately heavy burden."[125]

The constitutionality of benign sex discrimination was again addressed the following year in *Schlesinger v. Ballard*.[126] A male naval officer challenged a statutory discharge provision that allowed female naval officers a longer term of service without promotion before discharge became mandatory. The provision presumably was designed to correct for the more limited promotion opportunities of women.[127] Characterizing the provision as being remedial in nature and upholding its constitutionality, Justice Stewart, writing for the majority, distinguished the statute from the classifications in *Reed* and *Frontiero*, which presumably were based upon "overbroad generalizations"[128] concerning sex roles and to be supported solely by administrative convenience.[129] The *Ballard* Court premised its holding upon the "complete rationality" of the naval provision, thus suggesting application of the rational basis test to remedial gender-based classifications.[130] Continuing to urge suspect classification status for gender-based classifications, Justice Brennan, joined by Justices Douglas and Marshall, dissented from the holding. Justice Brennan further found no legislative history to support the remedial purpose upon which the majority opinion relied and therefore found the majority's willingness to "conjure up"[131] legislative purposes to be a retreat from the Court's recent analysis into the objectives underlying challenged classifications.[132]

The holdings in *Kahn* and *Ballard* were viewed by some commentators as offering women "the best of all worlds—a Supreme Court ready to strike down classifications that discriminate against females, yet vigilant to preserve laws that favor them."[133] Several state and lower federal courts

124. 416 U.S. 351 (1974).
125. *Id.* at 355.
126. 419 U.S. 498 (1975).
127. *Id.* at 508.
128. *Id.* at 507.
129. *Id.* at 510.
130. *Id.* at 509.
131. *Id.* at 511
132. *Id.* at 520-21.
133. Ginsberg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 CONN. L. REV. 813. 818 (1978).

viewed *Kahn* and another sex discrimination case, *Geduldig v. Aiello*,[134] as a return of substantial deference to state social and economic legislation.[135]

Later in the same term in which *Ballard* was decided, the Supreme Court decided *Weinberger v. Wiesenfeld*.[136] Justice Brennan, in a unanimous opinion, applied the rationale of the *Ballard* dissent—close scrutiny of legislative purpose—to a Social Security Act provision that granted widows, but not widowers, survivor's benefits based upon earnings of the deceased spouse. The Court conducted a detailed analysis of section 402(g) of the Social Security Act and found that, in its enactment, Congress had not been concerned with compensating women for past discrimination in employment opportunities. The Court found instead that Congress was concerned with the principle that children of covered employees were entitled to the personal attention of the surviving parent if that parent chose not to work.[137] That the government's choice of women and not men for that purpose evidenced that the legislation was based on the sexually stereotypic presumption that widows as a group would choose to forego work to care for children while widowers would not.[138] Moreover, the Court found the challenged provision actually penalized female wage earners by providing them less protection for their families than male wage earners.[139] Given the paternalistic purpose and actual adverse effect on female wage earners, the Court therefore declared the gender-based distinction unconstitutional.[140]

Because the Court in *Wiesenfeld* found the provision to discriminate against women rather than to favor women, a majority of the Court had yet to declare sex a suspect classification and therefore to apply "close scrutiny of legislative purpose"[141] to a bona fide benign gender-based classification.

In 1976 the Court in *Craig v. Boren*[142] invalidated the benign gender-based classification of an Oklahoma statute that linked sex to alcohol related accidents to forbid the sale of 3.2 percent beer to males under the age of twenty-one and females under the age of eighteen.[143] Because the Court continued to withhold suspect status from gender-based

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134. 417 U.S. 484 (1974).

135. *See, e.g.*, Kohr v. Weinberger, 378 F. Supp. 1299 (1974), *vacated for lack of jurisdiction*, 422 U.S. 1050 (1975) (Social Security benefit calculation formula favoring females through use of three fewer elapsed years held to violate no constitutional principle); Murphy v. Murphy, 232 Ga. 352, 206 S.E.2d 458 (1974), *cert. denied*, 421 U.S. 929 (1975) (Georgia alimony statute providing support only for wives held not to violate either state or federal constitutions).

136. 420 U.S. 636 (1975).

137. *Id.* at 648.

138. *Id.* at 651-52.

139. *Id.* at 645.

140. *Id.* at 653.

141. 419 U.S. 498, 511 (1973).

142. 429 U.S. 190 (1976).

143. *Id.* at 191-92.

classifications, the strict scrutiny test was not applied. Rather, the Court articulated a refined equal protection test for gender-based classifications based upon the standards set forth in prior gender discrimination cases: "[C]lassiciation by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[144] Although the majority recognized traffic safety as an important governmental objective, it found that the statistical relationship between gender and traffic safety in relation to beer consumption far too attenuated to satisfy the requirement that the distinction be substantially related to achievement of that statutory objective.[145]

The following year the Court applied the *Craig* "means-end" test to a Social Security Act provision[146] challenged in *Califano v. Goldfarb*.[147] The Court found unconstitutional a provision that provided survivor's benefits to any widow, but allowed similar benefits only to those widowers who could prove that their deceased wife had actually been providing at least one-half of their support.[148] As in *Wiesenfeld*, the Court not only found no legislative history of remedial purpose but also found that the gender-based classification actually deprived female wage earners of protection for their families, which protection similarly situated men received as a result of their employment.[149]

Less than a month after *Goldfarb* was decided, the Court heard *Califano v. Webster*.[150] This was the first Supreme Court case since *Ballard* to involve a gender-based classification that favored women without also penalizing them in the form of reduced benefits to their families. It was also the first benign gender-based discrimination case to follow *Wiesenfeld*, which relied on close scrutiny of legislative purpose, and *Craig*, which developed the means-end test.

In *Webster* a male challenged a Social Security benefit computation formula[151] that entitled women to use three fewer elapsed years than men and therefore entitled women to receive higher payments than men with the same past earnings. The Court upheld the Social Security Act provision under a *Kahn-Ballard* rationale—it compensated women for disabilities resulting from a history of past discrimination against women. Furthermore, unlike *Goldfarb*, in *Webster* the Court found clear legislative history of a direct remedial purpose—reduction of the disparity

144. *Id.* at 197.

145. *Id.* at 201-02.

146. 42 U.S.C. § 402(e) (1), (f) (1) (1970 & Supp. V 1975).

147. 430 U.S. 199 (1977).

148. *Id.* at 216-17.

149. *Id.* at 206-07.

150. 430 U.S. 313 (1977).

151. Section 215 of the Social Security Act, 42 U.S. C. § 414 (1970) (amended 1972). This was the same code section that was challenged in Kohr v. Weinberger, 378 F. Supp. 1299 (1974), *vacated for lack of jurisdiction*, 422 U.S. 1050 (1975).

in economic condition between men and women caused by a long history of discrimination against women.[152]

The Court in *Webster* appeared to leave open the door to gender-based classifications adopted by the legislature to compensate women for the effects of past discrimination. The Court's continued reception to remedial gender-based statutes, however, must be considered further in light of its decision in *Regents of the University of California v. Bakke*.[153] In *Bakke* a white male challenged a state medical school's special minorities admissions program.[154] A divided Court struck down, five to four, the admissions program, which set aside a specific number of places for minorities, but upheld, five to four, properly devised affirmative action programs.[155] In *Bakke* only five members of the Court reached the equal protection issue. Four justices found the admissions program's quota system defective on statutory grounds.[156] Only Justice Powell, applying the strict standard of scrutiny, found the quota violative of equal protection.[157] Justices Brennan, White, Marshall and Blackmun, applying only an intermediate level of scrutiny, would have upheld the admissions program. Justice Brennan suggested that affirmative action programs that meet four criteria should be subjected only to intermediate scrutiny. Those criteria are: (1) that no fundamental right be involved; (2) that the class disadvantaged by the program not have the traditional indices of suspectness; (3) that the classification be relevant to the goal sought; and (4) that the classification neither be based on a presumption of inferiority of the favored class nor stigmatize or stereotype that class.[158]

In his prevailing opinion in *Bakke*, Justice Powell clearly distinguished sex from race and therefore found only the latter a suspect classification.[159] Justice Brennan, however, in his opinion, compared race to gender:

> First race, like "gender-based classifications too often [has] been inexcusably utilized to stereotype and stigmatize politically powerless segments of society." *Kahn v. Shevin* (dissenting opinion) . . . While a carefully tailored statute designed to remedy past discrimination could avoid these vices, see *Califano v. Webster*; . . . we nonetheless have recognized that the line between honest and thoughtful appraisal of the effects of past discrimination and paternalistic stereotyping is not so clear and that a statute based upon the latter is patently capable of stigmatizing all women with a badge of inferiority.[160]

152. 430 U.S. 313, 318 (1977).

153. 438 U.S. 265 (1978).

154. *Id.* at 269-70.

155. *Id.* at 361-62.

156. Justice Stevens joined by Chief Justice Burger and Justices Stewart and Rehnquist found the admissions program to violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-4 (1976).

157. 438 U.S. 265, 320 (1978).

158. L. TRIBE, AMERICAN CONSTITUTIONAL LAW ch. 16 (Supp. 1979).

159. 438 U.S. 265, 302-03 (1978).

160. *Id.* at 360 (Brennan, J., concurring and dissenting).

Thus, prior to *Orr v. Orr*,[161] the stage was set for requiring a remedial gender-based classification to meet the four preliminary criteria of properly devised affirmative action programs or be subject to strict scrutiny.

B. Orr v. Orr

The Court in *Orr v. Orr*[162] held that an Alabama statutory scheme which allowed women but not men to recover alimony from ex-spouses violated the equal protection clause of the Constitution. The Court's decision, although justified on the facts in *Orr*, left uncertain the constitutionality of future bona fide affirmative action statutes based on gender.

The relevant gender-based statutes in *Orr* were first enacted in 1852 and undoubtedly founded upon paternalistic "old notions" about women and women's place in society. The Court could have summarily defeated the challenged classification under the means-end test formulated in *Craig*. The Court, however, chose to formulate a stricter equal protection test to be used on gender-based classifications. The Court made this stricter test applicable not only to classifications with paternalistic purposes as in *Orr* but also to gender-based classifications with compensatory and ameliorative purposes. Thus, the Court in *Orr* violated one of its primary rules of self-governance, which provides that: "The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' "[163]

In the majority opinion Justice Brennan initially set out the means-end test of equal protection scrutiny as formulated in *Craig*. " 'To withstand scrutiny' under the equal protection clause, 'classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.' "[164] Given their paternalistic purpose, the Alabama alimony statutes did not meet their standard. Even prior to formulating the means-end test in *Craig*, the Court had held in *Wiesenfeld* that the "mere recitation of a benign, compensatory purpose [was] not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."[165] Furthermore, in *Wiesenfeld* the Court found that a statute based upon the generally accepted presumption that a man is responsible for the support of his wife and children would not suffice to justify a gender-based classification.[166] Nonetheless, the Court went beyond the standards articulated in *Craig* and *Wiesenfeld* to require a state, in addition to satisfying the means-end test,

161. 440 U.S. 268 (1979).

162. *Id.*

163. Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936), *quoting*, Liverpool N.Y. & P.S.S. C. v. Emigration Commissioners, 113 U.S. 33, 39 (1885).

164. 440 U.S. 268, 279 (1979).

165. 420 U.S. 636, 648 (1975).

166. *Id.* at 652-53.

to prove that the compensatory or ameliorative purpose could not be as well served as by a gender-neutral classification that would avoid the risks of reinforcing stereotypes.[167]

Although the majority subjected both compensatory and ameliorative gender-based distinctions to the stricter standard of scrutiny, it recognized a difference between these two types of remedial legislative purposes. Compensatory actions could be defined as efforts seeking to rectify present effects of a history of past discrimination. The purpose of the challenged property tax exemption in *Kahn* could be viewed as compensatory. Ameliorative actions could be defined as efforts seeking to remove the underlying causes of the discrimination. The purpose of the admissions program challenged in *Bakke* could be seen as ameliorative as well as compensatory.[168]

The challenged statutes in *Orr*, however, were neither compensatory nor ameliorative. The Alabama statutes were the amended versions of alimony statutes first enacted in 1852.[169] Although these statutes were not accompanied by legislative history, it would be difficult to assume that they were enacted sixteen years prior to the enactment of the fourteenth amendment with either a compensatory or ameliorative purpose as their basis. Furthermore, the Alabama Supreme Court explained that these statutes were grounded on the common law obligation of a husband to support his wife and prevent her from becoming a ward of the state.[170] Past precedent clearly had held unconstitutional government objectives that were based on similar old notions that trapped men and women in stereotyped roles.[171] Without an important governmental objective as their basis, the Alabama statutes therefore could have been found unconstitutional as not meeting the first requirement of the means-end test.

The majority, however, did not limit the opinion to invalidating reverse gender-based classifications justified by paternalistic purposes. The Court expanded the opinion to invalidate reverse gender-based classifications supported by remedial or administrative convenience purposes. The Court achieved this result by assuming important state objectives. Alabama could have had an interest in financially assisting needy spouses with sex functioning as an indicator of need. Alabama could have also had an interest in compensating women for past discrimination in the institution of marriage. The Court, however, summarily rejected both of these purposes as invalid.[172] It found that neither constitutionally supported the sex-based distinction because both could be as well satisfied

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167. 440 U.S. 268, 281 (1979).

168. *See* 89 HARV. L. REV. 47, 102 (1975).

169. ALA. CODE §§ 1971, 1972, 1973 (1975).

170. Davis v. Davis, 279 Ala. 643, 644, 189 So. 2d 158, 160 (1960); Sims v. Sims, 253 Ala. 307, 311, 45 So. 2d 25, 29 (1950).

171. *See, e.g., Wiesenfeld* discussion at notes 165-66 and accompanying text *supra*.

172. 440 U.S. 268, 281-82 (1979).

by a gender-neutral statute. Furthermore, the majority added that "even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored."[173]

Rather than simply stating that administrative convenience did not constitute an important governmental objective under the means-end test, the Court found that no administrative convenience was achieved by the alimony statutes. It assumed little if any additional costs would burden the state if gender-neutral statutes were enacted. Although one must seriously question the validity of this assumption, it is more questionable why the assumption was even made. By this reasoning, the Court pressumably would be amenable to a gender-based distinction that was supported by a substantial administrative convenience purpose. Although *Reed* apparently precludes upholding as constitutional a gender-based statute justified solely by administrative efficiency, *Geduldig* could be interpreted as modifying *Reed* when administrative considerations were found to be overly burdensome. *Orr* suggests an extension of the holding in *Geduldig* and a further erosion of *Reed*. In *Orr*, the Court therefore does not reject administrative convenience as an important governmental objective; it only rejects unjustified and insubstantial administrative convenience as an important objective.

The majority also found gender-based classifications unconstitutional if their compensatory or ameliorative purpose was as well served by a gender-neutral classification. This conclusion is puzzling. If an alimony statute was enacted to reduce the economic disparity between men and women, which disparity was caused by a long history of discrimination against women in the institution of marriage, how could that purpose be achieved by providing alimony to husbands as well? Divorced husbands have not been alleged to be a class working under an economic burden caused by a history of discrimination against men in marriage.

In any event there was nothing in *Orr* to support the existence of either a compensatory or an ameliorative purpose. Justice Brennan appeared to use *Orr* as a vehicle to implicitly elevate gender to suspect status and then to require that an "arguably" affirmative action statute based upon gender be required to satisfy the third (that the classification be relevant to the goal) and fourth (that the classification not stigmatize or stereotype the favored class) criteria[174] of a properly designed racial affirmative action program. The majority added these criteria of *Bakke* to the *Craig* means-end test to fashion a stricter standard of equal protection scrutiny for gender-based classifications. To be justified under this standard of scrutiny the gender-based distinction must first meet the *Craig* means-end test, which requires the classification to be substantially related to the achievement of an important governmental objective. Additionally, the purpose

173. *Id.* at 281.

174. *See* note 158 and accompanying text *supra*.

of the gender-preferential legislation must not be as well served by a gender-neutral statute. Finally, the challenged statute must be carefully tailored to avoid the stigma of sexual stereotypes.

Courts may encounter substantial difficulties in applying this standard to bona fide compensatory and ameliorative gender-based statutes. The only reason the Alabama legislative purpose in *Orr* was as well served by a gender-neutral statute was because the statutes did not involve a compensatory or ameliorative purpose. Compensatory and ameliorative purposes can not by definition be satisfied by gender-neutral classifications.

The Court may not have intended that truly compensatory and ameliorative legislation be subjected to gender-neutral statute comparison. It may only have been reiterating its language in *Wiesenfeld* that noted the mere recitation of a benign compensatory purpose would not be an automatic shield against inquiry into the actual statutory purpose. Therefore, under gender-neutral comparison, perhaps only those statutes that lack a truly compensatory or ameliorative purpose will be found unjustified.

Unfortunately, because the statutory purpose in *Orr* could be as well satisfied by a gender-neutral statute, the Court provided no guidelines on how a gender-based classification might meet its final requirement of being carefully tailored to avoid sexual stigma and stereotyping. If by "carefully tailored" the Court meant that compensatory and ameliorative statutes could not be drawn to assist women as a group in overcoming the burden of generalized discrimination, the Court's decision in *Orr* does not endanger bona fide remedial programs for women and probably advances the cause for equality between the sexes.

By requiring gender-preferential statutes to define precisely the class to be benefitted, the Court would eliminate overinclusive statutes that carry unnecessary costs of additional stigma. The problem of overinclusiveness was present in *Kahn*. There a gender-based classification allowed all women, regardless of their individual economic circumstances, to benefit by a property tax exemption granted because women in general had been subjected to economic discrimination. Statutes like that in *Kahn* single out women as a special class incapable of adequately providing for themselves and therefore in need of a protector, be it a husband, father, or government. Thus, these statutes serve to reinforce the sexual stereotypes that true ameliorative statutes seek to eradicate.

If by "carefully tailored" the Court meant that compensatory and ameliorative gender-based legislation could not carry some risks or sexual stereotypes, the Court's decision in *Orr* casts serious doubt on the future of those statutes designed to rectify the effects and remove the underlying causes of discrimination against women. Regardless of how precisely these statutes were drawn, they would be likely to carry some risk of stigma of sexual stereotypes. This additional "statutory" stigma would in most cases

be minimal in comparison with the underlying historical stigma the statutes were designed to remedy. Therefore, some additional stigma should be tolerated as a present cost of the ultimate elimination of the historical source of the discrimination. Unfortunately, the Court's opinion in *Orr* did not provide legislators with an indication of how much, if any, additional stigma would be constitutionally permissible.

C. *Future Implications of* Orr v. Orr

Orr v. Orr[175] was the first major benign gender-based discrimination case to be heard after the Court's decisions in *Webster* and *Bakke*. Adopting the rationale of the Brennan group in *Bakke*, the Court developed a stricter standard of equal protection analysis to be applied in challenges of benign gender-based classifications. Arguably, if a benign gender-based classification met the *Bakke* criteria of a properly designed affirmative action program, the intermediate level of scrutiny, as was applied by the Brennan group in *Bakke*, would also apply to a carefully tailored and truly ameliorative gender-based classification.

Under this equal protection standard, the continued vitality of *Kahn v. Shevin*[176] must be seriously questioned. In *Kahn*, Florida legislation provided widows but not widowers with an automatic $500 property tax exemption. The Court assumed the financial difficulties facing a lone woman exceeded those facing a man, and, therefore, allowed the gender-preferential statute to stand. This type of generally drawn, compensatory statute carries costs of sexual stigma that the *Orr* decision prohibited. Furthermore, under the facts in *Kahn*, a gender-neutral statute that required proof of financial need would better serve the governmental purpose of alleviating the economic difficulties of citizens who had lost their marital partners.

The majority, however, did not expressly overrule the decision in *Kahn*. Justice Blackmun concurred with the majority in *Orr* on the assumption that it "in no way cuts back on the Court's decision in *Kahn*."[177] Notwithstanding Justice Blackmun's opinion, *Kahn* must at a minimum be viewed as limited by *Orr*. Outside areas of law, such as tax, in which the states historically have been granted substantial deference, *Kahn* presumably can no longer be relied on as supporting the constitutionality of generalized gender-preferential treatment.

By implementing a stricter standard of judicial scrutiny in gender-based classification challenges, for all but the carefully tailored and truly ameliorative statutes, the Court in *Orr* progressed toward insuring against all governmentally fostered discrimination unsupported by a compelling governmental need. This progression was set back, however, less than two

175. 440 U.S. 268 (1979).
176. 416 U.S. 351 (1974).
177. 440 U.S. 268, 284 (1979) (Blackmun, J., concurring).

months after *Orr* was decided. On April 24, 1979, the Supreme Court heard two equal protection cases—*Parham v. Hughes*[178] and *Caban v. Mohammed*.[179] Both cases involved gender-based classifications that denied unmarried fathers rights that were granted unmarried mothers. Neither involved a compensatory or an ameliorative statute. The statutes in both cases were based on archaic generalizations about maternal and paternal family roles. In *Parham* the Court upheld the constitutionality of the statute and permitted Georgia to deny an unmarried father, but not an unmarried mother, the right to sue under a wrongful death statute. In *Caban* the Court held a New York statute violative of the equal protection clause by denying an unmarried father, but not an unmarried mother, the right to object to adoption of his illegitimate child. In *Parham*, Justice Stewart, joined by Justices Rehnquist and Stevens and by Chief Justice Burger, distinguished prior precedent, including *Orr*, by reasoning that mothers and fathers of illegitimate children were not similarly situated. Justice Powell concurred in the plurality opinion only because the Georgia statute allowed an unmarried father to remove the statutory disability by choosing to legitimize the child. In *Caban*, New York provided no opportunity for the unmarried father to remove his disability. Justice Powell joined those dissenting in *Parham*—Justices White, Brennan, Marshall and Blackmun—to invalidate the New York gender-based adoption classification.

The existence of the opportunity to elect to remove a sex-based disability does not justify an otherwise unjustifiable discriminatory, sex-based disability. As the dissent in *Parham* noted: "The plurality not only fails to examine whether requiring resort by fathers to the legitimization procedure bears more than a rational relationship to any state interest, but also fails even to address the constitutionality of the sex discrimination in allowing fathers but not mothers to legitimate their children."[180]

The apparent inconsistency between the *Parham* opinion and the *Caban* opinion and between the *Parham* opinion and the *Orr* opinion can be explained by more than the rationale that *Parham* involved classes of men and women who were not similarly situated. The *Parham* case was probably decided more on policy grounds. *Parham* involved the denial of an unwed father's claim for damages under a wrongful death act. Therefore, *Parham* can be seen as a refusal to extend the liability of a tortfeasor rather than a denial of parental rights to the father of an illegitimate child.

Lower courts should limit the decision in *Parham* to its facts. The decision in *Orr*, however, should, to preserve consistency, be given the broad reading that its language suggests. All gender-based classifications that are not carefully tailored to avoid the stigma of sexual stereotypes or

178. 441 U.S.347 (1979).

179. 441 U.S. 380 (1979).

180. Parham v. Hughes, 441 U.S. 347, 361-62 n.2 (1979) (White, J., dissenting).

that are supported by purposes that can be as well served by gender-neutral classifications will be subjected to the strictest level of equal protection scrutiny.

IV. CONCLUSION

The Court's decision in *Orr v. Orr* continued a liberal trend in the law of standing. An injury in fact has arguably become the primary requirement of standing. The requirement of a redressable injury may be satisfied even in the absence of a likelihood that the courts intervention will provide the claimant ultimate relief. If the claimant has alleged a bona fide injury of which the courts intervention offers some promise of relief, the decision in *Orr* will support granting the claimant federal standing. Unfortunately some of the language of *Orr* also supports the stricter rules of standing, which require a substantial likelihood for ultimate relief before federal court intervention may be gained.

Thus, in *Orr* the Court has declined the opportunity to precisely limit and define the rules of standing. The standing language in *Orr* will continue to permit a federal court to grant standing when it desires to sustain a claim on the merits and to deny standing when the substantive claim would be defeated.

In the area of equal protection, the majority in *Orr* followed the rationale of Justice Brennan's opinion in *Bakke*, implicitly elevating gender to suspect classification status and subjecting all but the carefully tailored and truly ameliorative gender-based classifications to strict judicial scrutiny. *Orr* arguably would not foreclose the use of the intermediate level of scrutiny in the equal protection analysis of a gender-based classification that was both carefully tailored and necessary to achieve its goals. Because the facts in *Orr* did not involve this type of classification, the constitutionality of future bona fide affirmative action programs and statutes in the area of gender remains uncertain.

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